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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 162

UNITED STATES OF AMERICA,

Appellant,

v.

ARNOLD L. DAILEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLEE

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Opinions Below

The Memorandum Opinion of the District Court was filed on April 24, 1951 (R. 2) and the order dismissing the indictment was filed on the same day (R. 3-4). Neither is reported.

Jurisdiction

The order of the District Court dismissing the indictment was entered April 24, 1951 (R. 3-4). Notice of Appeal was filed by the United States on May 24, 1951 (R. 4). Probable

jurisdiction was noted by this Court on October 8, 1951 (R. 6). The jurisdiction of this Court to review on direct appeals the decisions of the District Courts sustaining, prior to the attachment of jeopardy, the appellees' pleas in bar to the indictments is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F.R. Crim. P.

Questions Presented

1. Whether the statute suspending the running of statutes of limitations applicable to offenses involving fraud against the United States "until three years after the termination of hostilities," as proclaimed by the President applies to offenses committed after the date of proclaimed termination of hostilities and within the three year period following the date thereof.

2. Whether an offense under Section 1001 of the United States Code involves as an essential ingredient such fraud as is within the contemplation of the Suspension Act staying the running of statutes of limitations applicable to offenses "involving fraud against the United States."

Summary of Argument

The indictment in the present case charges appellee with the commission of an offense under Section 1001, United States Code (1948 Rev.). The crime is alleged to have been committed on March 14, 1947. As the indictment was not returned until September, 1950 the offense is barred by the statute of limitations unless suspended by the Act of June 25, 1948, 18 U.S.C., § 3287. It is appellees contention that the latter statute did not suspend the running of the statute of limitations in the present case for the reasons that (1) the crime was committed after the President's proclamation of the termination of hostilities and (2) the substantive offense charged does not involve as an essential ingredient fraud within the contemplation of the Suspension Statute.

I

It is appellees contention that Section 3287, of Title 18, United States Code, operates to suspend the statute of limitations in offenses committed prior to the date of termination of hostilities as proclaimed by the President. The statute applies only "when the United States is at war" and suspends the running of any period of limitations until three years after the termination of hostilities. Properly interpreted, an offense committed after the close of hostilities does not fall within either the language of the statute or within its purpose. As reflected by the legislative history of the suspension statutes leading up to the Act of 1948, which under the rule set forth in *United States* v. *Obermeier*, 186 F. (2d) 243 (2nd Cir.), is the statute applicable in the present case, Congress intended to toll the running of any applicable statutes of limitations in fraud cases until, and only until, the proclamation of termination of hostilities, for throughout the Congressional reports the period of the war is considered co-extensive with the period of hostilities. The purpose of the legislation was to save the right of the Government to prosecute fraud cases "until the end of the war." Using the term in its limited sense, Congress made the termination of hostilities as proclaimed by the President, the decisive and critical date thereof.

II

Section 1001 of Title 18 (1948 Rev.) United States Code making it a crime for one to knowingly and wilfully make a false or fraudulent statement within the jurisdiction of any agency of the United States does not involve, as an essential ingredient of the crime, an intent to defraud the United States. Consequently under well-settled principles enunciated by this Court in cases involving statutes enacted in 1921 and 1926 which in terms were practically identical

with the present Wartime Suspension of Limitations Act, such an offense does not fall within the definition of "fraud" as used in the suspension statute. *Noveck* v. *United States*, 271 U. S. 201; *United States* v. *Scharton*, 285 U. S. 518.

To fall within the definition of fraud as used in the suspension statute, it is necessary that the statute defining the offense requires as an essential ingredient an intent to defraud the United States in a pecuniary manner. Section 1001 of Title 18, United States Code, involves neither an intent to defraud or a pecuniary loss.

Although the District Court did not bottom its decision in dismissing the indictment on the ground that the offense did not involve fraud within the contemplation of the Suspension Act, there being no indication whether such point was raised below, this Court has the power, and appellee has the right to urge, affirmance on this ground.

ARGUMENT I

The Wartime Suspension of Limitation Act Does Not Toll the Running of the Statute If the Offense Was Committed After Cessation of Hostilities.

The offense in the present case was allegedly committed on March 14, 1947. The indictment was returned on September 29, 1950, more than three years after the date of the offense. It is clear that the offense is barred by the statute of limitations (18 U.S.C. §3282) unless the running of such statute has been suspended under the provisions of Section 3287 of Title 18, United States Code. This section, adopted by the Act of June 25, 1948, 62 Stat. 828, provides, insofar as pertinent, as follows:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether

by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress."

The lower court held that this suspension statute was not applicable on the ground that the offense alleged "was not committed until some two and one-half months *after* termination of hostilities of World War II as officially and conclusively proclaimed by the President and at a time when the United States was *not* at war" (Tr. 2, 3).

As appears from the Government's brief, hostilities in World War II were declared to be terminated on December 31, 1946 by Presidential Proclamation 2714 (App. pp. 43-44 Gov't. Brief). The question therefore is whether on March 14, 1947 the United States was at war within the meaning of the Act of June 25, 1948.

In the brief filed on behalf of the United States, it is urged that as the crime in the present case was alleged to have been committed in 1947, the Suspension of Limitations Act of 1942, as amended (56 Stat. 747; 58 Stat. 649, 667; 58 Stat. 765, 781; 18 U.S.C. (1946 ed.) 59 (a)), is to be applied, rather than the Act of June 25, 1948 (Sec. 3282, Title 18), although that act was repealed in 1948. To substantiate this contention the Government relies on Section 21 of the Act of June 25, 1948, 62 Stat. 862, which provides that "any rights or liabilities" then existing under the repealed laws (one of which was the Suspension of Limitations Act, as amended) should not be affected by the repeal.

It is submitted, however, that this contention is without merit. It has been fully answered contrary to the Government's position in the case of *United States* v. *Obermeier*, 186 F. 2d 243 (2d Cir.), *cert. denied* 340 U. S. 951. There the Circuit Court of Appeals for the Second Circuit considered the effect of the saving clause (Sec. 21) contained in the Act of June 25, 1948 upon existing statutes of limita-

tions. After a careful and detailed analysis of existing cases the court held that the words "right or liabilities now existing" relate only to *substantive* "rights" and "liabilities" and therefore did not save statutes of limitations, as such statutes affect the "remedy" only and are considered no part of a "right" or "liability." In the words of Judge Frank, if Congress had a contrary intention "it would have been so easy to have said so."[1] Consequently, repeal without an effective saving provision constitutes a legislative pardon or amnesty. *United States* v. *Chambers*, 291 U. S. 217, 223; *Yeaton* v. *United States*, 5 Cranch. 281, 283; *Maryland* v. *B. & O. Railroad Co.*, 3 How. 534.

The only statute of limitations therefore which can be in any manner held applicable in the present case is that found in Section 3287, Title 18, United States Code, rather than the earlier statute. See *Falter* v. *United States*, 23 F. (2d) 420 (2d Cir.). It is necessary to determine therefore the meaning of the words "when the United States is at war" as used in the 1948 statute. In so doing it must be borne in mind that statutes tolling a statute of limitations must be strictly construed in favor of a defendant. *United States* v. *McElvain*, 272 U. S. 633; *United States* v. *Scharton*, 285 U. S. 518.

Phrases such as "when the United States is at war," "during war," "termination of war" and the like are words having no definite or fixed meaning. See VI HACKWORTH, DIGEST OF INTERNATIONAL LAW (State Department) § 590.[2]

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[1] Without burdening this Court with an analysis of the applicable decisions which are fully set forth in the Court's opinion in the *Obermeier* case, appellee believes it necessary only to cite a few of such decisions. See *Great Northern Railway Co.* v. *U. S.*, 208 U.S. 452; *Hertz* v. *Woodman*, 218 U.S. 205, 218; *Hallowell* v. *Commons*, 239 U.S. 506.

[2] Historically, war has been said to be terminable and to end in one of three ways: (1) by a simple cessation of hostilities; (2) by conquest of one belligerent by another; (3) by treaty of peace. See *Taylor, International Public Law*, § 580.

Concededly, this Court has held on numerous occasions that for purposes of the exercise of the war powers this country is deemed to be at war until a treaty of peace has been ratified in accordance with law. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 164-168; *Hijo* v. *United States*, 194 U. S. 315, 323; *Ludecke* v. *Watkins*, 335 U. S. 160. In other instances and for other purposes it has been held by various courts that the words in question relate only to the period prior to termination of hostilities. See Note (1947) 47 Col. L. Rev. 255, 267, and cases there cited. It has been observed that the distinction in particular cases rests on the type of statute or problem involved; thus, for example, where a determination that a war is over affects only a few, courts are more ready to find the end of war to exist. *Ibid.*[3] It is of interest to note that four Justices of this Court in the case of *Ludecke* v. *Watkins, supra*, stated in May of 1948 that it was but a fiction to say that this country was at that time at war with Germany. (See dissent of Justices Black, Douglas, Murphy and Rutledge).

Looking to the statute in question, the critical date is the proclaimed termination of hostilities, and for purposes of determining the applicability of the Suspension Act it would serve no purpose, and accomplish nothing, as will appear hereinafter, to construe the words "at war" in their broadest sense, rather than strictly, as we are required to do, to

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[3] Congress itself has on numerous occasions determined, for particular legislation, that World War II has been terminated. In the War Brides Act (59 Stat. 659, 8 U.S.C. Sec. 232-236) the period of the war is stated to be from December 7, 1941 to "proclaimed termination of hostilities." By joint resolution of Congress of July 25, 1947, 60 Stat. 451, termination of the war for purposes of the Servicemens' Readjustment Act of 1944, 58 Stat. 291, 38 U.S.C. Sec. 694 (a) (h), as well as the provisions of Chapter 12 of Title 38 United States Code, pertaining to veterans' education benefits, was declared to be on June 25, 1947.

Upon the issuance of the President's proclamation terminating hostilities on December 31, 1946, fifty-one wartime statutes automatically came to an end. For a list of these statutes see *New York Times*, January 1, 1947, page 22, columns 1-8.

include offenses committed after the proclamation by the President on December 31, 1946, which itself was not made until more than fifteen months after the shooting war had stopped.[4]

It is difficult to attach significance to the words "when the United States is at war" unless it is read in light of and is defined by the words "termination of hostilities as proclaimed by the President." To bring a case within the Suspension Act both war and hostilities must exist, for although a technical state of war may exist—as it does today, five years after cessation of hostilities—it is the period of hostilities which was intended to be the critical time calling for the suspension of limitations.

The purpose of the suspension statute is clear. Its need was obvious in time of armed conflict. With law enforcement officials preoccupied with strict enforcement of security measures and with contracting and other agencies of the Government concerned with prosecuting the actual war to a successful conclusion, additional time was necessary to allow the Department of Justice to discover, investigate and bring to prosecution criminal fraud cases committed while the conflict was in progress. After the cessation of actual hostilities such need created by the hurly-burly of war was no longer present. The date of termination of hostilities Congress left to the sound judgment of the Chief Executive to be exercised by him at such time as he deemed propitious.

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[4] French, *The End of the War*, 15 G.W. L. Rev. 191, 194: "The official events of World War II are as follows: On May 7, 1945, unconditional surrender terms were signed by the military leaders of Germany. On August 14, 1945 the Japanese Government announced that it accepted our terms and on September 2, 1945 the formal documents were signed on the deck of the U.S.S. Missouri. On August 16, 1945, the President issued a proclamation calling on the people to give thanks for the victory won. The proclamation related how the war lords of Japan had surrendered, how a global victory had been won. No mention was made of the end of the war or of hostilities. On August 18, 1945 the President issued Executive Order No. 9599 for the guidance of the war agencies."

The determination of that fact by him, it is submitted, constitutes the end of the war for purposes of the statute here involved.[5]

Although the Government relies upon legislative history of the suspension of limitations statutes in supporting its interpretation, such legislative history in fact substantiates the construction contended for by appellee. Looking to such history as it is set forth in the Government's brief (pp. 27 et seq.) it is apparent that throughout the Congressional reports and debates the words "when the United States is at war" were intended to mean a period prior to termination of hostilities.

In connection with the original Act of August 24, 1942, 56 Stat. 747, the reports of the committees of both Houses of Congress[6] cited the history of the 1921 Act extending the statute of limitations after World War I to six years (42 Stat. 220). In connection with the 1921 Act, Congressman Graham of Illinois, the sponsor of the bill (H. R. 8298) made the following statement on the floor of the House:

> "Mr. Speaker and gentlemen of the House, shortly after the present Congress was convened I called the attention of the Attorney General to the fact that the statute of limitations was running on almost every kind

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[5] It is believed significant that although the shooting in World War II had ceased by August, 1945, termination of hostilities was not proclaimed until the last day of December, 1946, a period of more than 16 months. This indicates a determination that all danger of renewed hostilities was at an end and that the pressure of carrying on the tremendous war program had been lifted. Apart from the fact that to the average citizen the war terminated in 1945 when the shooting stopped, the President waited to make the same official, thereby extending the applicability of existing legislation, such as the Suspension Act, during the post-hostility period when the country was demobilizing and reconverting from war to peace. During this actual "post-hostility" period and prior to the proclamation on December 31, 1946 the Suspension Act was in effect and obviously covered any crimes committed during such post-hostility period.

[6] House Report No. 2051 and Senate Report No. 1544, 77th Congress, 2d Sess.

of crime that had been committed, or that could be charged as having been committed, during the war. Section 1044 of the Criminal Code provides a period of limitation of three years on almost all offenses against the Government, *such as might have been committed at any time during or since the war. As the war ended on the 11th of November, 1918*, it will be seen that a great many of these crimes are already barred by the statute of limitations, the bar having been complete on the 11th of November, 1921, as to all crimes committed during the war period. As to all such crimes, no prosecution can now be had. However, *in the period following the war*, and in the things that grew out of the war, crimes were committed which are not yet barred, and it has been thought useful, inasmuch as the Attorney General is now investigating many of these matters, that the statute should be so extended that if there has been crime the Department of Justice may prosecute." (Ital. supplied.)

When it is remembered that although the treaty of peace in World War I was not ratified until November, 1921 and yet Congress was informed that, for purposes of prosecution of crimes committed *during the war*, the sponsors of legislation extending the period of limitations considered that war to have been terminated on November 11, 1918, and that such historical reference is included in the very reports of the Congress which adopted the present legislation, it is difficult to come to a conclusion other than, for purposes of this legislation, the period of the "war" is coterminous with the period of hostilities.

This conclusion finds further support in the Report of the Senate Committee on Military Affairs accompanying the bill which became the Surplus Property Act of 1944 (S. 2065), in which it was stated with respect to the limitation period, as follows:

"As was provided in the Contract Settlement Act of 1944, the statute of limitations with respect to offense

against the laws of the United States arising in connection with activities under this act was suspended until 3 years after termination of hostilities in the present war. This provision has been necessitated by the magnitude of the operations involved under this act, and the intensive preoccupation of both participants and witnesses with the war effort. *It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war* and will then require considerable time before they advance to the stage of litigation.[7] (Ital. supplied.)

Significantly, the Surplus Property Act, Section 38 (58 Stat. 784) provided for the expiration of the Act "at the end of three years following the date of the cessation of hostilities in the present war." This fact considered with the excerpt from the Report set forth above again supports appellee's contention.

Furthermore, nowhere in the legislative history does there appear any intent upon the part of Congress to suspend the statutes of limitations in connection with offenses committed after the termination of hostilities. On the contrary that which does appear affirmatively supports appellee's interpretation. Thus in the reports accompanying H. R. 6484,[8] the committees stated as follows:

> "During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to

[7] S. Rep. 1057, 78 Cong. 2d Sess. p. 14.
[8] H. Rep. No. 2051 and S. Rep. No. 1544, 77th Cong. 2d Sess.

defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

"Your committee is of the opinion that action should be taken at this time to extend the limitations statute *so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of the present-day events,* for the protection of those who would defraud or attempt to defraud the United States. (Italics supplied.)

Likewise in the report accompanying the Surplus Property Act of 1944, *supra*, the committee stated as a reason for the necessity for suspending the period of limitations that the bulk of the offenses covered by the Act "will not be *apprehended* or *investigated* until the end of the war, and will then require considerable time before they advance to the stage of litigation."

From the foregoing it is crystal clear that what Congress was concerned with was providing a period of time for the *apprehension* and *investigation* of crimes committed *during hostilities,* and not crimes committed thereafter, for nowhere in the legislative history does Congress speak in terms of anything other than its concern with the apprehension and investigation of crimes during hostilities when the law enforcement branch of the Government was otherwise preoccupied with enforcement of security laws such as espionage and sabotage. There was no purpose in extending the period of limitations for crimes committed after the termination of the actual conflict and at the conclusion of the "gigantic War program."

The Government takes the position that as the suspension

of the statute of limitations was contained in the Contract Settlement Act of July 1, 1944 (58 Stat. 649) and in the Surplus Property Act of October 3, 1944 (58 Stat. 765) and as these Acts were enacted when the end of the war was in sight and had for their purposes the regulation of activities following the termination of hostilities and during the period of converting to a peacetime economy, that, therefore, offenses committed after the termination of hostilities must have been intended to be included. The Government's contention in this respect is untenable. In the first place, it is difficult to follow the statement that in 1944 the end of the war was in sight. In the second place, the stated objectives of the acts establish the contrary. Thus, in the Contract Settlement Act of 1944[9] the very first objective is stated to be the facilitation of maximum war production, and in the Surplus Property Act[10] the first stated objective is to assure the most effective use of surplus property for war purposes and the common defense.

As is indicated in the legislative history of the Contract Settlement Act, problems with respect to termination of war contracts in the very midst of the war, with adverse affect on the war effort, was one of the reasons for adopting the legislation.[11]

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[9] 41 U.S.C. § 101.

[10] 50 U.S.C. App. § 1611.

[11] Senate Report No. 836 to accompany S. 1718, 78th Cong. 2d Sess.:

"The great need for legislation in the field of contract termination has been emphasized repeatedly by the heads of the Government agencies concerned, as well as by industry and labor groups which have felt the effects of contract termination. The present procedure of contract termination is cumbersome and results in unnecessary delays injurious to our economy. In the event of wholesale termination in the course of the war, this procedure would, in the option of this committee, dangerously impede expeditious conversion to the peacetime economy."

House Report 1590, to accompany S. 1718, 78th Cong. 2d Sess.:

"See what happened in the Brewster case. Thirteen thousand workers were suddenly catapulted out of their jobs by a summary

It is respectfully submitted that giving due weight to the legislative history of the suspension of limitations statutes, and applying a rule of strict construction, in accordance with the pronouncement of this Court, Section 3287 of Title 18, United States Code, must be afforded the interpretation given to it by the lower court, and its judgment should be affirmed.[12]

ARGUMENT II

The Suspension Statute Does Not Apply in a Case Where, as Here, the Intent to Defraud Is Not an Essential Ingredient of the Statute Defining the Offense.

Although the trial court dismissed the indictment on the ground that the statute of limitations had run against the offense, expressly holding that the Suspension Act did not toll the statute because the crime was committed after the

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cancellation of contracts for the manufacture of planes. No notices of cancellation were given. On the eve of invasion, the facilities and manpower of the Brewster plant remain idle. Unless drastic steps are taken, we have the disturbing spectacle of a waste we can ill afford. The Navy Department, apparently, did not consider the use of the plant for other war work despite the fact that Donald Nelson, Chairman of the War Production Board, urges greater war production as April records fall below March."

[12] The Government argues (p. 26) that if the lower court's construction is adopted an anomaly will result in that the prosecution of an offense committed on December 31, 1946 may be instituted as late as December 31, 1952 but prosecution for one committed on the following day, January 1, 1947, must have been instituted by January 1, 1950 or be barred. Such argument begs the question. Its fallacy is demonstrated by the following: The Suspension Act is effective only "when the United States is at war." War in its broadest sense terminates when a treaty of peace is ratified. Assuming that such interpretation applies in this case and a treaty of peace had been signed on June 1, 1948. Adopting the Government's construction, the period of limitations for a crime committed on May 31, 1948 would not expire until December 31, 1952. A crime committed on June 2, 1948, on the other hand, would be barred from prosecution on June 1, 1951, eighteen months sooner than in the case of a crime committed two days before. Such a possibility would have been equally anomalous. The fact that a treaty of peace was not in fact ratified does not render the situation, except in retrospect, different.

cessation of hostilities. A second and equally, if not more, important ground upon which the lower court's decision can be sustained, is that the Suspension Act does not apply to the type of offense here involved.

It is well-established that an appellee has the right to urge, and this Court has the power to consider, grounds for affirmance of a judgment apparent of record, although not raised below. *Langnes* v. *Green*, 282 U. S. 531, 538-539; *Oklahoma* v. *Civil Service Comm.*, 330 U. S. 127, 134 Note 3; *LeTulle* v. *Scofield*, 308 U. S. 415, 421.

The statute under which appellee was indicted (*Sec. 35(A) of the Criminal Code*, 35 Stat. 1095, as amended, 18 U. S. C. 1001 (formerly 18 U. S. C. Sec. 80)) provides as follows:

> "Whoever shall * * * make or cause to be made any false or fraudulent statements or representations, * * * knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The indictment in the present case charges the offense in the exact language of the statute in that the appellee "did knowingly and willfully make a false and fraudulent statement and representation in a matter within the jurisdiction of the United States Department of Agriculture" (Tr. 1).

The Wartime Suspension of Limitations Act, (62 Stat. 828, 18 U. S. C. (1948 Rev.) § 3287) which was in effect on the date of appellee's indictment, provides insofar as applicable, as follows:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United

States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended * * *."

In the case at bar the question is raised for the first time in this Court as to whether or not the normal three year statute of limitations is tolled by the first clause of 18 U. S. C. Sec. 3287 in a prosecution under 18 U. S. C. Sec. 1001 which involves only the making of false and fraudulent misrepresentations on matters within the jurisdiction of government agencies, where neither purpose to defraud the United States nor pecuniary loss to the United States is an ingredient of the offense and is not alleged.

To determine this question it is necessary to first decide whether the words "offenses involving fraud or attempted fraud against the United States, or any agency thereof in any manner, whether by conspiracy or not," as used in 18 U. S. C. § 3287, included within their scope a charge that appellee "did make a false and fraudulent statement * * * which said statement and representation was false and fraudulent."

It is respectfully submitted that the legislative history and applicable decisions of this Court, and other courts, determine the issue here involved favorably to the appellee. The pertinent language of the first clause of the Suspension Act, 18 U.S.C. § 3287, "involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not" derives originally from the first clause of the Suspension Act of August 24, 1942, 56 Stat. 747. This language was originally found in a proviso to 18 U. S. C. Sec. 582, enacted November 17, 1921, in connection with war frauds arising out of the first World War (42 Stat. 220, repealed by Act of December 27, 1927, 45 Stat. 51). The 1921 proviso reads:

"Provided, however, that in offenses involving the defrauding or attempts to defraud the United States

or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. * * *"

This proviso was construed by this Court in *United States* v. *Noveck*, 271 U. S. 201, and in *United States* v. *McElvain*, 272 U. S. 633.

In *United States* v. *Noveck*, *supra*, the question was whether the 1921 proviso applied to perjury in an income tax return. The indictment alleged that the perjury was "for the purpose of defrauding the United States." This Court held that the six year statute did not apply, because defrauding the United States is not an element of the crime of perjury.

In *United States* v. *McElvain*, *supra*, this Court held that the six year statute of limitations involved in the *Noveck* case did not apply to a conspiracy to defraud the United States by making a false income tax return.

United States v. *Scharton*, 285 U. S. 518, further supports appellee's contention. In that case the defendant was indicted for an attempt to evade taxes by falsely understating his income. To the indictment the defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the government, if accompanied by dishonest methods, are attempts to defraud the United States, within the meaning of the Revenue Act of 1926, 44 Stat. 114; United States Code Supp. V, Title 18, Sec. 585, which was identical with the 1921 provision. This Court held, however, that the six year limitation applicable to offenses involving the defrauding of the United States did not apply to the offense charged. In so holding Mr. Justice Roberts, speaking for a unanimous Court, said:

"* * *. as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and

ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses * * * The purpose of the proviso is to apply the six year period to cases 'in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.'"

Since Congress, in enacting the Wartime Suspension of Limitations Act of August 24, 1942, as amended, employed the essential language of the 1921 and 1926 provisos, it is presumed, under well-established rules of statutory construction, that it adopted the construction of that language given by the Supreme Court in cases involving the 1921 and 1926 provisos. *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 488, 489; *United States* v. *Ryan*, 284 U. S. 167, 175.

The interpretation of the Suspension Act, here contended for, finds direct support in the case of *Marzani* v. *United States*, 83 U. S. App. D. C. 78, 168 F. 2d 133, affirmed without opinion, 335 U. S. 895. In that case the United States Court of Appeals for the District of Columbia held that an indictment charging the defendant with having made a false and fraudulent statement in a matter within the jurisdiction of an agency of the United States (the same charge under which appellee in this case was indicted) did not fall within the Wartime Suspension of Limitations Act. After a review of the decisions of this Court, Judge Prettyman stated as follows:

"It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute. If perjury on

an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding the United States within the meaning of a statute of limitations, we do not see how making a false statement in the course of an inquiry into one's qualifications for federal employment can be.

"The contention of the Government is that the *Gilliland* case, supra, [312 U. S. 86] merely held that an intention to swindle or defraud the Government, resulting in property or pecuniary loss, is not an element of proof under the False Claims Act; and that the Act retained, after its amendment, 'all its essential fraud characteristics', that 'the conception of fraud against the United States formerly expressed in the statute' was retained by the 1934 amendment. It says that a false statement made in a matter within the jurisdiction of an agency of the United States 'necessarily involves a fraud'. The gist of the Government's contention is stated thus:

"'However, where an offense violative of the second clause involves 'knowingly and willfully' making 'false and fraudulent statements,' the statute (recognizing the intrinsically wilful and fraudulent element in the very nature of the acts proscribed) does not require the government to establish proof of (a) intent to defraud, or (b) pecuniary or property loss to the United States. Hence, the essential fraud elements continue as a constant in Section 80, [Title 18, U.S.C.] although the accidental language has changed insofar as 'intent of cheating and swindling or defrauding' found in the Act of October 23, 1918, may have varied the form rather than the substance of the offense.'

"The difficulty with the foregoing contention is that it ignores the plain rulings in *Noveck* and kindred cases. Those cases involved false statements, under oath. The offenses tended to obstruct, by dishonest means, the operation of a department of the Government. The Court held that the Suspension Act (actually an identical predecessor) does not apply to such

offenses. So that even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the *Noveck* and similiar cases related to precisely that same sort of fraud. * * * "

In *United States* v. *Obermeier*, 186 F. 2d 243 (2d Cir.), the Suspension Act as it now reads, was held, by Judge Frank, speaking for the Circuit Court of Appeals for the Second Circuit, to suspend a statute of limitations "only when fraud or attempted fraud against the United States (or one of its agencies) 'is an ingredient under the statute defining the offense' and does not, absent a statutory definition, apply to perjury or false swearing, even when the United States is directly interested."

It is respectfully submitted that the Suspension Act applies only where both the intent to defraud and pecuniary or property loss to the United States are essential ingredients under the statute defining the offense.

With respect to the intent to defraud as an essential ingredient, the opinions of this Court in *United States* v. *Noveck*, *United States* v. *McElvain* and *United States* v. *Scharton*, set forth above, are decisive. This Court in these cases has rejected the contention that fraud or the intent to defraud is implicit in such crimes as perjury and wilfull attempt to defraud the payment of a tax by false returns. In these cases, this Court has held that statutes extending statutes of limitations in cases involving fraud will not be allowed to be used to create new classes of crimes involving fraud, unless clearly so intended and it has refused to find such an intent in the provisos of 1921 and 1926. On the contrary, this Court has ruled that such provisos, which in terms are identical with the Suspension Act here involved, are not to be extended by construction to embrace frauds

not so designated by the statutes creating the substantive offenses.[13]

The statute under which appellee was indicted (18 U.S.C. 1001 (1948 Rev.)) provides that anyone who, within the jurisdiction of any Government department, makes any false or fraudulent statement or representation knowing the same to contain any false or fraudulent statement, shall be punished. Intent to defraud is neither set forth nor can the same be implied. This is apparent, it is submitted, from a reading of the very next section of the United States Code (Sec. 1002) which makes it a crime for one "knowingly and with intent to defraud the United States, or any agency thereof [to] possesses any false * * * writing * * * for the purpose of enabling another to obtain money from the United States." See also, 18 U.S.C. § 1003: "Whoever knowingly and fraudulently demands etc."

Section 1001 of Title 18, United States Code, is derived from the second clause of Section 80 of Title 18, as amended in 1934, 48 Stat. 996. The legislative history of the 1934 amendment to Section 80 shows that while Congress first sought to include the words "with intent to defraud" and later to retain "defrauding" as an essential element in the offense, the amendment as finally enacted (and as it now appears in Sec. 1001) rejected this attempt and framed the statute on a different basis. This legislative history is

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[13] Where the intent to defraud was an essential ingredient of the crime charged the six-year period of limitations contained in the provisos have been held applicable. For example, see *Bailey* v. *United States*, 13 F. 2d 325 (9th Cir.) wherein the court held that defrauding the United States was a statutory ingredient of the offense of uttering forged endorsements to a government check with intent to defraud. In *Weinhandler* v. *United States*, 20 F. 2d 359 (2nd Cir.) fraud was held to be an essential element of the crime of embezzlement. See also *Falter* v. *United States*, 23 F. 2d 420 (2nd Cir.) (Cert. denied 277 U.S. 590). In each of these cases, it should be noted, there was not only involved as an essential ingredient of the crime, the intent to defraud the United States, but also the element of pecuniary loss to the United States.

summarized in *United States* v. *Gilliland*, 312 U. S. 86, 93-4, where the application of the second clause of Section 80 was sustained as to an indictment charging false and fraudulent statements in a matter within the jurisdiction of a department of the United States, where no with "intent to defraud" was alleged.[14] In this respect the following language of the court is pertinent:

> "The amendment eliminated the words 'cheating and swindling' and broadened the provisions so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations when these were knowingly and wilfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described . . .
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> "Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under Sec. 9 (c) of the National Industrial Recovery Act of (June 16) 1933 with respect to the transportation of 'hot oil.' The Secretary's effort was due, as he stated, to the lack

[14] The *Gilliland* case, it should be noted, did not involve the question of extending the period of limitations, did not construe the word "defrauding" as used in the 1921 or 1926 provisos and did not refer to the *Noveck* and *Scharton* cases. It had nothing to do with the interpretation of any statute suspending or extending a statute of limitations. The only issue with which the court was concerned related to a proper interpretation of the second clause of Sec. 80, Title 18, United States Code, as amended, in which as appears from the text above, the term "defraud" does not appear. It cannot be urged, therefore, that the *Gilliland* case in any way affects or limits the rule established by this Court in the *Noveck* and *Scharton* cases.

of a law under which prosecutions might be had (for the presentation of false papers.' The bill which was passed by Congress, however, was amended in its final status so as to require 'intent to defraud the United States.[15] This bill was returned by the President without his approval for the reason that the offense as defined was covered by existing law which provided for more severe punishment than that proposed by the bill. 78 Congressional Record, pt, 6 p 6778 (73rd Cong. 2nd ses.) Another measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to 'hot oil'. A bill was then passed and approved which included, with other amendments of Sec. 35, the provision now before us, omitting the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been caused.[16] The report of the Judiciary Com-

[15] For the text of this bill, see H.R. 8046, 73rd Cong., 2d Sess. which provides as follows: "* * * That every person who with intent to defraud the United States knowingly or wilfully makes or aids or assists in the making, or who with such intent in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, statement, certificate, voucher, or paper or writing purporting to be such, concerning or pertaining to any application, bond, bid, loan or payment thereof, or concerning or pertaining to any matter within the jurisdiction of any department, establishment, administration, agency, office, board, or commission of the United States or any corporation owned or controlled by the United States in whole or in part, shall be punished * * *."

[16] In reporting out this bill the Committee of Judiciary of the House stated "the rights of the accused are protected by the provision that the act must be committed wilfully and knowingly and with intent to defraud the United States." (H. Rept. No. 829 to accompany H.R. 8046).

The bill (H.R. 8912) which was resubmitted after the President's veto, contained the original language of clause 2 of Section 80, "with the intent of cheating and swindling or defrauding the government of the United States" (H. Rep't. No. 1463, May 3, 1934, to accompany H.R. 8912) and passed the House in this form (78 Cong. Rec. pt. 6, pp. 8136-37.) This bill, however, was amended in the Senate (S. Rep't. 1202, May 28, 1934, 78 Cong. Rec. pt. 6, pp. 9790, 11270, 73 Cong. 2nd sess.) and, as finally enacted, omitted not only "cheating and swindling" but also "or defrauding the government of the United States." (*ibid*, p. 11270)

mittee of the Senate stated that the amendment in question had been proposed by the Department of the Interior with the purpose 'of reaching a large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith."

In light of the legislative history of the amendment, the construction of the statute as it existed prior to the amendment, in *United States* v. *Cohn*, 270 U. S. 339, the purpose of the amendment to reach false papers, and the elimination of the words "with intent to defraud" and "defrauding" from the bill as finally enacted, it is submitted that, as this Court stated of the perjury statute in the *Noveck* case and of the Revenue Act in the *Scharton* case, both *supra*, the purpose to defraud the United States is not an element of the crime defined in Section 1001. Intent to defraud does not affect the charge, it need not be proved, and it may be rejected as mere surplusage. The *Gilliland* case, *supra*, itself, conclusively establishes that intent to defraud is not an essential ingredient of the offense.[17] See also *United States* v. *Mellon*, 96 F. (2d) 462, cert. den. 304 U. S. 586; *United States* v. *Presser*, 99 F. (2d) 819; *United States* v. *Goldsmith*, 108 F. (2d) 917, cert. den. 309 U. S. 678; *Ex parte Berkhoff*, 65 Fed. Supp. 976, 979, 159 F. (2d) 6; *United States* v. *Zavala*, 139 F. (2d) 830, 831.

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[17] It cannot be argued, as the Government attempted to do in *Marzani* v. *United States*, *supra*, that although the 1934 amendment to Section 80 of Title 18, United States Code (the predecessor of and identical with Section 1001, Title 18, here involved) eliminated as an element of the offense the phrase "for the purpose and with the intent * * * *of defrauding the United States*," the concept of an intent to defraud was retained by the 1934 amendment by providing that such statement must be made knowingly and wilfully. In the first place, the words "knowingly and wilfully" were not substituted for the intent formerly required before the amendment of 1934, as those words were in the original Act of 1918 and were carried over to the 1934 amendment. Moreover, the word "wilful" generally means no more than that the person charged with a duty knows what he is doing. It is not a substitute for or the equivalent of intent to defraud. See *Evans* v. *United States*, 153 U.S. 584,

It has been otherwise held that intent to defraud the United States is not an essential element, under false and fraudulent statutes, which in essential respects are identical with Section 1001 of Title 18. In *United States* v. *Van Leeuven*, 62 F. 69, 70 (D. C. Iowa. 1894), involving a statute making it a crime for one to "knowingly or wilfully make or aid or assist in the making * * * of any false or fraudulent affidavit * * * concerning any claim for pension * * * or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior" (R. S. Sec. 4746, July 7, 1898, 30 Stat. 718. See 18 U.S.C.A. § 81 (now superseded by 18 U.S.C.A. § 289) and which statute, like the one in the present case, did not include the words "defrauding" or "with intent to defraud," a demurrer to the indictment was overruled in the following language:

> "* * * if the indictment was based upon the provisions of Sections 5418, 5421, or 5479 of the Revised Statutes (U.S.C. Title 18, §§ 72, 73), the failure to aver the intent or purpose of defrauding the United States would probably be fatal to the indictment as these sections are alike in the provision that the acts named therein must be done with the purpose of defrauding the United States; and under the ruling of the Supreme Court of the United States in *U. S.* v. *Staats*, 8 How. 40-45, the purpose to defraud the United States is one of the essentials in the definition of the crime. I do not understand, however, that the indictment in question

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587-592; *United States* v. *Scharton*, 285 U.S. 518; *Fields* v. *United States*, 82 U.S. App. D. C. 354, 357, 164 F. (2d) 97. Furthermore, even if it may be assumed that the words "knowingly and wilfully" could in a given case mean that a person acts with a bad purpose and with intent to break the law, it will be difficult to hold that the meaning of such words in a statute from which "intent to defraud" was stricken intentionally, operates to restore to such statute the very intent which Congress eliminated. Compare 18 U.S.C. § 1003, in which Congress expressly used the words "whoever knowingly and fraudulently" rather than the words "whoever knowingly and wilfully."

is based upon either one of these sections, but upon the provisions of Section 4746 which declares that 'every person who knowingly or wilfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension or payment thereof or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions . . . shall be punished, etc.' The gist of this offense is not in an effort to defraud the United States but it consists in knowingly procuring the making of a false or fraudulent affidavit concerning a claim for pension or payment thereof, or any other matter within the jurisdiction of the Commissioner of Pensions. The statute does not in terms make an intent or purpose to defraud the United States an element in the offense and the facts necessary to fully make out the crime can be averred without charging the intent to defraud the United States."

See also *United States v. Hansee*, 79 F. 803 (C.C.N.Y. 1897) in which it was stated that no intent to defraud under this statute was required and an offense was committed if a person knowingly and wilfully procured the presentment of a false or fraudulent affidavit in support even of a just claim.

Based upon the foregoing decisions of this Court and the lower courts, it is respectfully submitted that defrauding the United States is not an essential element of the offense as defined by Section 1001 of Title 18, United States Code. To hold that fraud is an element of Section 1001 by incorporating such element from the Wartime Suspension of Limitations Act would be to create a new and separate offense contrary to the principles established by this Court in the *Noveck* and *Scharton* cases. The crime alleged in the indictment involved in the present case cannot be classified as a fraud under Section 1001 any more than the false statements in the *Noveck* case was classified as a fraud by the

perjury statute. Certainly there is no more fraud implicit in the present case than there was implicit in the false and fraudulent income tax returns involved in the *Scharton* case.

In addition to the fact that Section 1001 of Title 18 does not involve as an essential ingredient of the crime, a fraudulent intent, it is submitted, that the term "fraud" as used in the Suspension Act involves also a pecuniary or property loss to the United States.

The term "defrauding" has two accepted meanings. The usual and primary meaning of defraud is cheating the Government out of property or money. See *United States* v. *Cohn*, 270 U. S. 339, 346-57; *Hammerschmidt* v. *United States*, 265 U. S. 185, 188.

In other cases involving statutes where it is apparent that more was intended, defrauding has been held to have a secondary meaning of interfering with or obstructing lawful governmental functions by dishonest means. *United States* v. *Keitel*, 211 U. S. 370, 393; *Haas* v. *Henkel*, 216 U. S. 462, 479-480. In statutes where neither the language nor the context warrants an extension of the term "defrauding" or "fraud" to a secondary and broader meaning, these terms should be construed in their primary sense of cheating the government out of property or money. In this respect, it is submitted, that the term "fraud" as it appears in the first clause of the Suspension Act, 18 U.S.C., Sec. 3287, is limited to its primary sense of cheating the Government out of property or money. There are no words extending the meaning of the word beyond this primary sense. While it is apparent that in connection with the word "fraud" the words "in any manner, whether by conspiracy or not" are used, these relate to the methods of defrauding and not to the scope. If Congress had used, as it did in the general conspiracy statute (18 U.S.C. § 371) the words "or for any

purpose" the case may be different. To defraud the United States in any manner "or for any purpose" would cover the broadest definition of fraud, as appears from the cases under the Conspiracy Statute. Had Congress in enacting the Suspension Act intended to extend the meaning of the term "fraud" beyond its usual and primary sense, it could easily have done so by broadening the language to read "defrauding, whether by conspiracy or not, in any manner, or for any purpose." The failure to do so indicates an intent to restrict the term to its usual and primary meaning. This, it is submitted, is the effect of the holdings in the *Noveck* and *Scharton* cases, *supra*. See also *Marzani* v. *United States*, *supra*. Any contention to the contrary has been laid to rest by these decisions. If pecuniary loss is not an element of the offense covered by Section 1001 of Title 18, United States Code, the statute of limitations with respect to such offense is not suspended.

A consideration of the legislative history of the Wartime Suspension of Limitations Act leading to the enactment of the original Act in 1942 and its subsequent amendments, supports the contention that the term "fraud" as used in that Act was intended in its primary sense. See Senate Report No. 1544 and House Report No. 2051 to accompany H. R. 6484, 77th Cong. 2d Sess. (See excerpts set forth in Appendix hereto.)

It is apparent from these Reports that the reason for the enactment of the suspension statute in 1942 was the difficulty and time involved in investigating, discovering and gathering evidence to prosecute frauds in connection with the great expenditures of money by the Government for war materials and equipment and the necessary concern of the Department of Justice with enforcement of other laws, particularly those relating to espionage, sabotage, and other measures pertaining to the security of the country, which

prevented the discovery, investigation and prosecution of war contract frauds within the three year period of limitation. Nothing appears in the legislative history which negatives the apparent intent of Congress that the fraud involved in the suspension statute pertained to a pecuniary or financial loss resulting from such fraud; on the contrary such intent is affirmatively stated. Thus, as appears, in the Report, Congress was concerned, as was the Congress after the first World War, with ferreting out unscrupulous and fraudulent war contractors without being bound by a three year period of limitations. This clearly appears in the following language of the House Report (No. 2051):

> "During normal times the present three year statute of limitations may afford the Department of Justice sufficient time to investigate, discover and gather evidence to prosecute fraud against the government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and prosecute frauds against the government, it is recognized that in the varied dealings, opportunities will no doubt be presented for unscrupulous persons to defraud the government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law enforcement branch of the Government is also busily engaged in its other duties, including the enforcement of the espionage, sabotage and other laws."

No reason appears for extending the meaning of the words "defrauding" or "fraud" beyond their primary sense of cheating or depriving the Government of property or money. Consequently, the Suspension Act is applicable only where defrauding in this primary sense is an essential

ingredient under the statute defining the offense. The same rule of strict construction should be applied as was applied to its earlier counterpart found in the *Noveck* and *Scharton* cases. Section 1001 of Title 18, U. S. Code, does not involve such an element.

For the foregoing reasons it is respectfully submitted, that Section 1001 of Title 18, United States Code, is not an offense falling within the purview of the Wartime Suspension of Limitations Act, and that, therefore, the judgment of the lower court holding such Act inapplicable to the case at bar, should be affirmed. See *United States* v. *Shoso Nii*, 86 F. Supp. 971, now pending on direct appeal to this Court, No. 409, this Term, which case, appellee understands, involves the same question discussed herein.

Conclusion

It is respectfully submitted, therefore, for the foregoing reasons the order of the District Court dismissing the indictment should be affirmed.

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November 1951.

APPENDIX

Excerpts from House Report No. 2051; 77th Cong., 2d Sess.:

"The purpose of the proposed legislation is to suspend any existing statute of limitations applicable to offenses involving the defrauding or attempting to defraud the United States or any agency thereof for the period of the present war. Contracting for the United States is done through various agencies, including the departments and independent establishments and government owned and government controlled corporations and frauds against all of these agencies are intended to be embraced by the bill.

"During the World War many frauds committed against the government were not discovered until the three year Statute of Limitations had almost expired and, as stated in the Committee report hereafter referred to many of the alleged offenses were barred from prosecution. The general criminal statute (Rev. Stat. Sec. 1044) was amended on November 17, 1921, extending the period to six years in respect to offenses involving frauds against the U. S. (42 Stat. 220 U.S.C. Title 18, Sec. 582). This provision was repealed by the Act of December 22, 1927 (45 Stat. 51).

"In connection with the World War legislation of this character, the committee Report (H. Rep. 365, 67th Cong.) stated the following:

" 'The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds against the government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require

the most minute investigation to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the Department may know whether prosecutions are justified or not. In many cases, months and perhaps considerably longer periods will be required for such investigations. Under the existing statute of limitations quoted above many of these alleged crimes are already barred and in all such cases under the law, no prosecutions can be had if any might be thought advisable.

* * *

"During normal times the present three year statute of limitations may afford the Department of Justice sufficient time to investigate, discover and gather evidence to prosecute fraud against the government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and prosecute frauds against the government, it is recognized that in the varied dealings, opportunities will no doubt be presented for unscrupulous persons to defraud the government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law enforcement branch of the Government is also busily engaged in its other duties, including the enforcement of the espionage, sabotage and other laws."